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No. 50

In the Supreme Court of the United States

OCTOBER TERM, 1954

WILLIAM A. BISSO, JR., RECEIVER, NEW ORLEANS COAL AND BISSO TOWBOAT COMPANY, PETITIONER

v.

INLAND WATERWAYS CORPORATION

ON [redacted] WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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OPINIONS BELOW

The opinion of the district court (R. 27–31) is reported at 114 F. Supp. 713. The opinion of the court of appeals (R. 35–38) is reported at 211 F. 2d 401.

JURISDICTION

The judgment of the court of appeals was entered on March 26, 1954 (R. 39). The petition for a writ of certiorari was filed on April 26, 1954, and was granted on October 14, 1954 (R. 41). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether exculpatory clauses in a towage contract, which provide that the operation is conducted at the sole risk of the tow and that the master and crew of the tug are deemed to be servants of the tow, are valid and may be interposed in defense of an action brought by the owner of the tow for damage incurred through the negligence of the tug.

2. Whether, assuming that such clauses are generally valid, they are nonetheless void in the situation presented by the instant case, *i. e.*, where the tow is an unmanned, unpowered barge.

STATEMENT

The barge Bisso #9 was owned by New Orleans Coal and Bisso Towboat Company (of which company petitioner is now the receiver)[1] when, on May 12, 1944, in tow of respondent's tug CAIRO, it struck a bridge pier near Greenville, Mississippi, and sank. The agreement of towage provided in pertinent part (R. 11–12):

> (4) The movement contemplated will be done at the sole risk of the "craft to be towed" and its cargo and neither the boats and/or any other equipment used in said service nor the owner, charterer, or hirer thereof shall be liable for any loss or damage to the "craft to be towed" or its cargo

[1] We shall use the term "petitioner" to refer either to the company or to the receiver.

> nor for any damage done by the "craft to be towed," however occurring. The masters and crews and employees of all boats and/or other equipment assisting the "craft to be towed" shall, in the performance of said service, become and be the servants of the "craft to be towed," regardless of whether the "craft to be towed" assists in the service in any way and irrespective of whether they be aboard the "craft to be towed" or in command thereof. Nothing herein contained, however, shall be construed as making the "craft to be towed", its owners, charterers or operators liable or responsible for loss of or damage to the property of FEDERAL BARGE LINES or third parties or for loss of life or personal injury for which the "craft to be towed" its owners, charterers or operators would not otherwise be liable or responsible.[2]

The facts relating to the mishap are undisputed and may be summarized as follows:

The BISSO #9 was one of eight unmanned and unpowered barges which the CAIRO took in tow at New Orleans, bound for Cairo, Illinois. On approaching the three-span bridge near Greenville, the CAIRO, with the BISSO #9 and three other barges

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[2] The contract was between petitioner's lessee, National Oil Transport Corporation, and respondent. There is no dispute that National was explicitly authorized by petitioner to accept a provision of the type set out above. See R. 22, 25.

in tow, tried to pass under the eastern span.[3] Forced by the strong current and a dangerous eddy to give up this attempt, the flotilla dropped back approximately 1,000 feet and attempted to pass under the center span. Under the middle of this span, the flotilla lost all headway. Emergency full ahead was ordered, but, just after the flotilla began to move forward again, a "boil" or turbulence in the water forced the head of the tow toward the east bank.[4] The flotilla "crabbed" to starboard, one barge struck the pier, and the consequent impact snapped a coupling wire of the BISSO #9, which was then swept up against the pier, where she buckled, turned over, and sank. (R. 23–24.)

The district court found (R. 25) that, considering the known conditions of river navigation at that point, the CAIRO was negligent in attempting to pass under the bridge, with four loaded barges, from a position dead in the water only a thousand feet distant. The court held that the "release clause" (that portion of the contract—quoted above—placing the sole risk of the operation on the tow), standing alone, was insufficient to relieve the CAIRO from liability for its negligence, but

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[3] The tow had been split up near Vicksburg and subsequently "double tripped," *i. e.*, moved alternately in groups of four barges, because of high waters and dangerous conditions on the river above (R. 23).

[4] As is ordinarily the case on the Mississippi River, this flotilla was made up with the barges in front and the tug pushing (R. 23).

that the "pilotage clause" (that portion—also quoted above—declaring the crew of the tug to be servants of the tow),[5] when read with the "release clause," unequivocally evidenced the intention of the parties to exonerate the tug from liability to the tow. (R. 26, 31.) Holding that such an agreement, when unequivocally expressed, is enforceable (R. 26), the court dismissed the libel (R. 32). The court of appeals, affirming the judgment, held that either the "release clause" or the "pilotage clause" was sufficient to exculpate the tug owner (R. 38).

SUMMARY OF ARGUMENT

I

Petitioner's broad contention that exculpatory provisions in towage contracts should be deemed invalid has been explored in the brief for the United States in *United States* v. *Nielson,* No. 210 (to be argued with this case). We there suggested that it did not appear that public policy required such provisions to be held completely void; that, however, considering the importance and the hazardous nature of towage, it was highly desirable to avoid sterilization of that incentive

[5] While the clause does not relate solely to the status of the pilot but to that of the master and the entire crew, the courts below used the term "pilotage clause" because of the provision's essential similarity to the clause involved in *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291. For convenience, we have adopted the same terminology.

to care which is rooted in the fear of loss; and that, for this reason (as well as reasons based upon the interpretation of the contract there involved), a tug should not be permitted to recover for its own damage resulting from the negligence of its own employee.

In the instant case, the tug owner (respondent) is not seeking an affirmative recovery. It seeks only to hold the tow owner (petitioner) to the clear and unequivocal undertaking to assume the risk of property damage to the towed barge and its cargo. Indeed, under the type of contract here involved (a standard form contract used by respondent), the tug owner expressly retained the risk of damage to its own property and the risk that third parties might suffer property damage, personal injury or loss of life. There is no reason to suppose that such a contract would dilute the incentive to care.

Unless, therefore, the Court should conclude that all exculpatory provisions in towage contracts are to be proscribed, it seems plain that the type of provision here involved should be enforced.

II

Petitioner argues, alternatively, that, even if exculpatory provisions are enforced in some cases, they should not be sanctioned when the tow is an unmanned vessel. There is no basis either in precedent or in sound policy for drawing such a

line. So far as the element of control is concerned, active direction and management of the essential functions of towage are necessarily gathered in the hands of the tug's employees whether or not the tow owner elects to man the tow.

Petitioner also contends, in similar vein, that when the tow is unmanned the tug is its bailee and that this Court should adopt a strict rule against exculpation by bailees for hire. But "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo," *Stevens* v. *The White City*, 285 U. S. 195, 200. The owner of the tow has the option to man it and is in no position to complain when he chooses not to do so. *Ibid.*

ARGUMENT

I. The validity of exculpatory provisions in towage contracts has not been definitively settled. Unless, however, those provisions are to be condemned in gross, petitioner here should not be relieved of its undertaking to assume the risk of injury to the towed barge and her cargo

Petitioner argues broadly (Br., pp. 13–14), in the language of Judge Coxe's dissenting opinion in *The Oceanica*,[6] "that 'it ought to be against public policy to permit a vessel to contract against her own fault', because 'to allow her to do so begets recklessness, carelessness and neglect'; and

[6] 170 Fed. 893, 896 (C. A. 2), certiorari denied, 215 U. S. 599.

that 'the same reasons for prohibiting such a contract in the case of common carriers apply, though not, perhaps, to the same extent, in the case of a towage contract. In both cases the design is to prevent those who have the absolute control of another's property from extorting an agreement that they may neglect all reasonable precautions to preserve it.'" Petitioner further argues that, even if such exculpatory clauses should be deemed permissible in the case of a tug towing a manned vessel, they should be struck down in the situation where the towed vessel is unmanned.

The question of the general validity of exculpatory provisions in towage contracts is also presented in *United States* v. *Nielson,* No. 210 (to be argued with this case). In *Nielson,* the United States, as owner of the towed vessel, was sued by the owner of a damaged tug on the theory that the contract there involved made the docking pilot (who was in the general employ of the tug) the "lent servant" of the tow, and that the tug was not only exculpated from liability for negligence but could affirmatively recover from the tow for the damage suffered by the tug in consequence of the pilot's negligence. The permissibility of a contractual provision exonerating the tug from the consequence of its negligence thus lies at the threshold of both cases. Instead of repeating *in extenso* the discussion of that ques-

tion which appears in the Government's brief in No. 210, we respectfully refer the Court to that brief (see pp. 10–29) for a statement of our position. In summary, the position elaborated in No. 210 is as follows:

(1) Exculpatory clauses, seeking to shift from tug to tow the tug owner's responsibility for the negligence of his employees, have been incorporated in towage contracts for many years. Their status in the courts, however, has long been unclear. On two occasions, in cases involving a "release clause" (*i. e.,* a clause declaring that all risks of the operation should be upon the tow), the Court declared in general terms that the towing vessel must be visited with the consequences of its own negligence. *The Syracuse,* 12 Wall. 167; *Compania de Navegacion Interior* v. *Fireman's Fund Insurance Company* (commonly known as *The Wash Gray*), 277 U. S. 66. In a third case, however, this Court permitted enforcement of a "pilotage clause" (a clause seeking to render the tugboat captain, while aboard the tow, in legal effect the "lent servant" of the tow). *Sun Oil Co.* v. *Dalzell Towing Company,* 287 U. S. 291. While the lower federal courts have, for the most part, assumed that *Sun Oil* broadly licensed the use of exculpatory provisions, the facts are consistent with a much more limited interpretation. In that case, the tugboat captain was actually performing the work of the ship (piloting

her, under her own power, in the open channel) when the mishap (running the vessel aground through an error of navigation) took place. Whether the Court would have reached the same result if an accident had occurred as a result of the tug captain's negligence in directing the performance of towage from the bridge of the tow is uncertain.

(2) Congress has not considered the question whether exculpatory provisions in towage contracts should be permitted. Moreover, the policies reflected in Congressional enactments relating to other aspects of water transportation furnish little guidance.

The courts have not looked with favor upon contracts exonerating a party from liability for its own negligence and such contracts, where permitted (as they have been in many situations), are always strictly construed against the party seeking exculpation. Whether public policy absolutely forbids enforcement of such a contract depends upon analysis of the relevant factors to determine whether there is gross unfairness between the parties or reason to apprehend serious detriment to the public interest.

So far as fairness between the parties is concerned, it is evident that the size and resources of tugboat companies as a class are not such as to indicate that they are in a position to dominate their patrons. Nonetheless, these companies have

considerable bargaining power by virtue of the strategic position which they occupy. Moreover, it appears that they have followed a parallel course of action and that the patron may find it very difficult to secure towing service without acceding to an exculpatory provision.

The fact that agents of the tow may be aboard her when towing service is provided furnishes little reason for permitting tug exculpation. In the actual performance of the towage operation, which the tugboat company is hired to direct and conduct because of its special know-how, equipment, and capabilities, effective direction and control passes completely into the hands of the tug company's employees.

There is, however, some economic justification for the tug's effort to shift risk. The operation is inherently hazardous and slight negligence may easily result in serious loss. And the value of the tow or its cargo is often highly disproportionate to the value of the tug.

The very hazards of the operation, however, make it especially important that there be no relaxation of that vigilance which the threat of liability encourages. Perhaps, a sufficiently strong sanction against carelessness by the tug company (which is, of course, a threat to personal safety as well as to property) is the great vulnerability of tugs in the event of mishap. It is accordingly of crucial significance, from the stand-

point of the policy considerations, that the broad rule sought by the respondent in the *Nielson* case not only would permit exculpation from liability but would also permit the tug company to recover for its own loss.

Balancing the various considerations, it does not appear that the factors weighing against exculpation are so strong and compelling as to require a holding that the industry practice is to be proscribed and exculpatory clauses deemed entirely void. In no event, however, should a tug company be permitted to recover for its own loss consequent upon the negligence of its own employees in the performance of towage. There is every reason to apprehend that such an extreme departure from the salutary principle that responsibility should accompany control would come close to destroying the incentive to care which the public interest demands.

In short, we suggested in *Nielson* that it did not appear that public policy required exculpatory provisions in towage contracts to be held completely void; that, however, considering the importance and the hazardous nature of towage, it was highly desirable to avoid sterilization of that incentive to care which is rooted in the fear of loss; and that, for this reason (as well as reasons based upon interpretation of the contract there involved), a tug should not be permitted to recover for its own damage resulting from the

negligence of its own employee. We would emphasize that this evaluation of the policy factors is not one tailor-made to enable the Government to prevail in both cases. The Government has widely adopted in its capacity as tug owner the practice which it suggests to the Court best conforms to the requirements of sound public policy. The contract in the instant case (which is a standard form contract of Inland Waterways Corporation, R. 9–10), while it provides that the tow owner shall assume the risk of damage to the tow, does not seek to make the tow the insurer of the tug. It states (R. 12): "Nothing herein contained, however, shall be construed as making the 'craft to be towed,' its owners, charterers or operators liable or responsible for loss of or damage to the property of Federal Barge Lines [operating subsidiary of Inland Waterways] or third parties or for loss of life or personal injury for which the 'craft to be towed,' its owners, charterers or operators would not otherwise be liable or responsible."

Unless exculpatory provisions are to be condemned in gross, there is no reason to relieve this petitioner of its undertaking to assume the risk that its barge would be damaged or destroyed. There is no dispute that the contract unequivocally expresses the intention to relieve the tug owner of liability to the tow. And the policy reasons which suggest a holding against the tug

owner in *Nielson* have no counterpart here. This is a pure case of limitation of liability. It is not a case in which the negligent party (the tug owner) seeks an affirmative recovery.

II. In determining the validity of exculpatory provisions in towage contracts, no valid distinction can be drawn between the case in which the tow is manned and the case in which it is "dumb"

Resting on the fact that the BISSO #9 was unmanned during the course of the towing operation which resulted in the mishap, petitioner argues that, even if exculpatory provisions are valid in some circumstances, they are to be denied enforcement when the tow is "dumb" and within the complete control of the tug's employees. Such a distinction has no basis either in precedent or in sound policy.

Petitioner argues, first, that in *The Syracuse*, 12 Wall. 167, and *Campania de Navegacion Interior* v. *Fireman's Fund Insurance Co.* (*The Wash Gray*), 277 U. S. 66, this Court determined that exculpatory provisions in towage contracts are generally contrary to public policy. This is a permissible interpretation of those cases, although they have also been widely and plausibly interpreted as standing simply for the proposition that exculpation from liability for negligence will be permitted only when the language of the contract unequivocally evinces that intention by the parties. See the Government's brief in No. 210,

pp. 11–14, and brief of Selim B. Lemle, *amicus curiae* in this case, pp. 5–14.

Faced, then, with the necessity of explaining this Court's subsequent holding in *Sun Oil Co.* v. *Dalzell Towing Co.*, 287 U. S. 291, which shows at least that exculpatory clauses are not invalid in all circumstances, petitioner declares (Br., p. 10) that the first two cases involved unmanned tows and *Sun Oil* a manned tow. This is not so. While *The Syracuse* is silent as to whether the towed vessel in that case (a canal boat) was manned or unmanned, it is perfectly plain in *Campania de Navegacion Interior* that master and crew were aboard the towed vessel (*The Wash Gray*). 277 U. S. at 72–73.

Sun Oil, in our view, is susceptible of either of two interpretations: (1) that exculpation for negligence is generally permissible when the intention of the parties to accomplish that result is expressed with sufficient clarity; (2) that exculpation was permissible in the circumstances there presented because the provision of the contract was clear *and* because the general employee of the tug (the docking pilot) was in fact doing the work of the tow when his negligence caused the accident. Neither interpretation, and nothing stated in any opinion of this Court, supports the view that the line should be drawn where petitioner suggests.

Petitioner also argues, in similar vein, that the CAIRO should be regarded as the bailee of the

"dumb" BISSO #9 and that the Court should invoke the "considerations precluding contractual exemption of a bailee for hire from liability for his negligence" (Br., p. 12). Even if there were a broad rule of law that a bailee for hire has no power to limit his liability for negligence by contract,[7] petitioner would be faced with the fact that "Decisions of this Court show that under a towage contract the tug is not a bailee of the vessel in tow or its cargo," *Stevens* v. *The White City*, 285 U. S. 195, 200.

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[7] For an indication of the wide diversity of views as to the circumstances in which a bailee for hire should be permitted to contract against liability for negligence, see Note, *Limiting Liability for Own Negligence*, 175 A. L. R. 8, 111 *et seq.* See, also, *Restatement, Contracts*, Sections 574, 575.

The rule assumed by petitioner is particularly doubtful in marine bailments. See *International Mercantile Marine S. S. Co.* v. *W. & A. Fletcher Co.*, 296 Fed. 855 (C. A. 2); *Newport News Shipbuilding & Dry Dock Co.* v. *United States*, 34 F. 2d 100 (C. A. 4); *Hall-Scott Motor Car Co.* v. *Universal Insurance Co.*, 122 F. 2d 531 (C. A. 9).

The concurring opinion of Judge Clark in *Turecamo Towing Corp.* v. *United States*, 125 F. 2d 1001, 1002 (C. A. 2), which the petitioner cites to show that there is authority for imposing a bailee's obligation upon the tug of an unmanned and unpowered tow, has reference only to the possibility of enforcing against such a tug the bailment rule that proof of loss makes out a prima facie case of negligence on the part of the bailee. A similar rule has been imposed even when the court has expressly disavowed the existence of the bailment relationship. *Sternberg Dredging Co.* v. *Moran Towing & Transportation Co.*, 196 F. 2d 1002, 1006, opinion on rehearing, 200 F. 2d 602, 604 (C. A. 2).

In *Stevens* v. *The White City,* the side of a towed vessel was unaccountably dented during the period that it was in tow. The owner maintained "that the tug was bailee for hire and that, by proving the tug received the tow in good order and delivered it in a damaged condition, he made a prima facie case of negligence which cast upon such bailee the burden of showing the circumstances surrounding the damage" (p. 198). It is to be noted that while a man was aboard the tow during the first part of the operation, he left the vessel, apparently before the damage occurred (p. 199). Thus, the tow was "dumb" and, from the standpoint of the relationship of the parties, the situation was exactly the same as it is in the instant case. Pointing out that the tow owner had a right to keep a man on board the tow (as, of course, is equally true of petitioner here), the Court declared it "immaterial" (p. 201) that he chose not to do so and restated the conclusion, reached in a number of prior decisions (see cases cited at pp. 200, 201), that towage contracts do not create bailor-bailee relationships.

Petitioner fails to point to any persuasive consideration which would justify a special and stricter rule relating to exculpation in the unmanned-tow case. So far as the factor of control is concerned, there can be no doubt that active control and direction of the essentials of the towage operation are necessarily in the hands of the

tug's employees whether or not the tow is manned. See Gov't brief in No. 210, p. 26. And, in any event, the choice of manning the tow or leaving it unmanned is that of the tow owner. *Stevens* v. *The White City, supra.*

Certainly, as we argue in No. 210, it is desirable that tugs, which necessarily control towage operations, should retain in significant measure that incentive to vigilance which derives from the risk of economic loss. But that is no argument for a more stringent rule against exculpation in the case of unmanned tows. Since the element of personal safety is involved in greater degree when the tow is manned—consider, for example, the case of a passenger ship being maneuvered to its berth in a congested harbor—the circumstance that a tow is "dumb" suggests, if anything, a more liberal rule. In any event, however, it is our position (Point I, *supra*) that under the type of towage contract here involved the incentive to vigilance is adequately preserved, for the tug owner retains a very substantial financial stake in the safe conduct of the operation, notwithstanding the barge owner's assumption of risk of property damage to the barge and its cargo. It is because of this—and, likewise, because of the absence of corresponding factors in the position taken by the tug owner in *Nielson*—that we urge affirmance here and reversal in No. 210.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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